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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 740

LORENTZ LUDVIGSEN,

Petitioner,

against

COMMERCIAL STEVEDORING CO. INC., and A/S L. J. MOWINCKELS REDERI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT A/S J. LUDWIG MOWINCKELS REDERI IN OPPOSITION

J. WARD O'NEILL,
Counsel for Respondent,
A/S J. Ludwig Mowinckels Rederi.

DAVID P. H. WATSON,
on the Brief.

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Opinions Below

The opinion of the District Court (App. App.* 3) is not officially reported. The opinion of the United States Court of Appeals for the Second Circuit (Appendix A Petition) is officially reported at 228 F. 2d 707.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

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* App. App. refers to Appellant's (petitioner's) Appendix in the Court of Appeals.

Questions Presented

The four questions presented by the petitioner on pages 2 and 3 of his Petition find no basis in the record or in the opinions of the two Courts below and are, in fact, hypothetical questions based upon assumed statements of fact.

The issue presented by the Petition is whether this Court will re-evaluate the trial testimony when, on a conscientious consideration of the entire record, a Court of Appeals has unanimously affirmed the District Court judgment dismissing the libel, and when the Court of Appeals has held that the findings of the trial Judge were "far from 'clearly erroneous'" (Appendix A, P. 37 of Petition).

The Statute Involved

No statute is urged by petitioner. The review by the Court of Appeals was conducted pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, and particularly that portion of Rule 52(a) reading as follows:

> "* * * Findings of fact will not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

Statement

The Petition seeks a review of the decision of the United States Court of Appeals for the Second Circuit rendered on January 3, 1956, insofar as it affirmed the District Court decree dismissing the libel after the trial.

Petitioner brought the action in the United States District Court for the Eastern District of New York to recover for injuries sustained by him on July 19, 1950, while

ascending a Jacobs ladder leading up from Erie Railroad lighter No. 114 to the main deck of the m/s Horda. The respondents were Commercial Stevedoring Co., Inc., the stevedore engaged in transferring cargo from Erie No. 114 to m/s Horda, and Mowinckels, the owner of the m/s Horda. It was petitioner's claim in the trial in the District Court that on the day of the accident his lighter, a Lehigh Valley Railroad lighter, referred to as Lehigh No. 139, came alongside m/s Horda and moored astern of Erie Railroad lighter No. 114, which was already alongside m/s Horda (R. 15, 16, 17). At that time there was already a Jacobs ladder leading from the main deck of m/s Horda down to Erie No. 114 (R. 17). The ladder had been rigged earlier in the day by the stevedore Commercial in order to enable its men to get to and from the lighter (R. 38; Mow. App.* 2a, 3a; R. 137-140; Mow. App. 13a, 14a).

In going to report his arrival to the freight receiving office of the stevedore on the pier, petitioner crossed over to Erie No. 114 and started climbing the Jacobs ladder (R. 18; Mow. App. 1a). When near the top of the ladder he fell down onto Erie No. 114 and was injured (R. 18; Mow. App. 1a). It was the testimony of petitioner's witness that the longshoremen, the employees of respondent Commercial had pulled up the Jacobs ladder after they had finished work on Erie No. 114 approximately one-half hour earlier, so that several rungs of the ladder were pulled inboard of the rail of m/s Horda (R. 47, 48; Mow. App. 3a, 4a). Petitioner's witness claimed that when petitioner was near the top of the ladder, this slack payed out, causing the ladder to drop several feet, at which point petitioner lost his grip (R. 49-53; Mow. App. 4a-7a).

On the other hand, the testimony of Commercial's witnesses was that at no time had the ladder been pulled up (R. 140; Mow. App. 14a; R. 169, 170; Mow. App. 16a, 17a). They said the ladder had been properly rigged by them,

* Mow. App. refers to Appendix to Mowinckels' Brief in Court of Appeals.

and that it remained so (R. 38, 39; Mow. App. 2a, 3a; R. 133-140; Mow. App. 12a-14a). Their testimony, both inferentially and directly, contradicted petitioner's claim that there had been unsecured slack in the ladder at the time he started up. The testimony of the Mowinckels' witness, the ship's officer, was that the Jacobs ladder had been properly secured both before and after the fall and was in perfect condition (R. 230; Mow. App. 21a; R. 241, 242; Mow. App. 22a; R. 260; Mow. App. 24a, 25a). Here, too, the testimony, both directly and inferentially, pointed to the fact that there had been no slack in the ladder. Other discrepancies in testimony, too numerous to list, served to cast doubt upon libelant's case. All the conflicting testimony and the discrepancies were fully quoted in Mowinckels' Appendix in the Court of Appeals and in Commercial's Appendix in the same Court.

The trial Judge, after hearing the testimony of the fourteen fact witnesses, all of them in person, made sixteen findings of fact, eight of which bore directly upon the rigging, condition and use of the Jacobs ladder (App. App. 14-18). The trial Judge specifically found that there had been no slack in the ladder as claimed by libelant (Findings 10 and 16; App. App. 16 and 17). Based upon these findings of fact, the trial Judge concluded that "libelant failed to carry his burden of proof to establish his cause of action against either respondent" (Conclusion 2; App. App. 18).

The trial Judge both in his opinion and in his findings of fact, referred repeatedly to the conflicts of testimony which formed the basis for his disbelief of petitioner and petitioner's witnesses on the issue of the alleged slack in the Jacobs ladder (App. App. 3-8 and 14-18).

Petitioner then appealed to the United States Court of Appeals for the Second Circuit alleging that "the opinion of the Trial Judge saw issues of fact where the testimony created none and found conflicts of testimony where none existed" (Page 1, Appellant's Brief in Court of Appeals).

The United States Court of Appeals for the Second Circuit, in an opinion by Chief Judge Clark, affirmed the decree below on the merits, modifying it only by reducing the costs allowed to respondent Mowinckels, a matter not relevant to the Petition. In passing upon the substantive aspects of the appeal, Chief Judge Clark wrote as follows (App. A, P. 37 of Petition):

> "The issue as tried below was as to whether or not there was actually any such slack (left presumably by the stevedore's workmen); and Judge Bruchhausen, upon a most careful analysis of the considerable testimony of the various people present, rejected that tending to show the presence of slack and found that libelant had not sustained his burden of proof. Accordingly he dismissed the libel.
>
> This crucial finding of the Trial Court, so carefully accommodated to the testimony as presented, must be accepted as being far from 'clearly erroneous'. *McAllister* v. *United States*, 348 U. S. 19, 20."

Chief Judge Clark concluded that

> "The dismissal of the libel must therefore stand."

Apparently undaunted by the fact that three Judges of the Court of Appeals agreed with the trial Judge on the facts, petitioner now urges to this Court that the "Trial Judge * * * misapprehended the evidence, overlooked some testimony and found conflicts where none existed and contradictions and inconsistencies where the testimony created none" (Petition 8). This was the same claim he unsuccessfully brought before the Court of Appeals. Now that the affirmance by the Court of Appeals is behind him, petitioner also claims that the Court of Appeals "got its view of the case from the Trial Judge and in adopting his views adopted also his errors and misconceptions as to the testimony" (Petition 32).

ARGUMENT

The issue presented by the petitioner is factual only. Petitioner is asking this Court to review the entire District Court record on the presumption that having done so, this Court would have to conclude that the District Court Judge was wrong in his evaluation of the conflicting testimony, and that the Court of Appeals was also wrong in having held unanimously that the findings of the District Judge were "far from 'clearly erroneous' ".

The four questions presented on pages 2 and 3 of the Petition, are hypothetical and find no basis in the record or in the opinions of the District Court or the Court of Appeals.

In the first question petitioner asks this Court whether a District Court Judge as a trier of the facts may "disregard the uncontroverted evidence of disinterested witnesses". The critical word in that question is, of course, "uncontroverted". Petitioner claims the testimony was uncontroverted, but the District Judge and the Court of Appeals disagreed with him. The District Judge found that the testimony on the crucial points was in conflict and found the trial record to be replete with contradictions. His opinion and his findings of fact leave no doubt about that. The petitioner made this same claim in appealing to the Court of Appeals. The Court of Appeals rejected the argument.

The second question presented by the petitioner asks whether the finding of conflict by the trial Judge can be supported in the record when "there is in fact no such conflict". The District Court Judge and three Court of Appeals' Judges all thought there *was* conflict of testimony, and the latter found the "crucial finding of the trial Court so carefully accommodated to the testimony as presented".

In the third question petitioner asks this Court whether a decision of a District Court Judge must be accepted by the Court of Appeals when it "is palpably based on misconceptions of the evidence and on unwarranted inferences therefrom apparent on the face of the record". Petitioner assumes in this third question that the decision of the trial Judge was in no way "dependent on his judgment as to the credibility of the witnesses based on their appearance and manner" (Petition 3). Certainly the findings of fact and the opinion of the trial Judge indicate otherwise. The trial Judge specifically rejected certain phases of the testimony of some witnesses and specifically accepted the contradictory versions given by other witnesses. Rule 52(a) of the Federal Rules of Civil Procedure is abundantly clear as to the scope of review by a Court of Appeals in such a situation when it states that:

> "* * * due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses. * * *"

Finally, in his fourth question, petitioner presents nothing more than a truism. He asks whether it is not the obligation of the Court of Appeals to determine whether it is not left "with a definite and firm conviction that a mistake has been committed". That, of course, is a quotation from the decisions of this Court both in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395, and *McAllister* v. *United States*, 348 U. S. 19, 20. This Court used that language as a criterion for determining whether findings of fact were "clearly erroneous". Since the Court of Appeals found that the crucial findings of fact were "far from 'clearly erroneous'" and then cited *McAllister* v. *United States, supra,* it would seem that the Court of Appeals had the rule of the *McAllister* decision in the forefront of its mind. The only manner in which this could have been made clearer for the benefit of the petitioner would have been if Chief Judge Clark had included

in his opinion a verbatim statement that the Court was *not* left "with a definite and firm conviction that a mistake has been committed" (333 U. S. 395).

The Decision Below is Clearly Correct

The trial in the United States District Court for the Eastern District of New York was held before the Judge, sitting in admiralty without a jury. The key issue was pinpointed by the trial Judge in his opinion as follows (App. App. 5):

> "The principal issue is whether there was a slack in the ladder, caused by pulling the upper portion of it up on to the deck. It is undisputed that the ladder was owned by the shipowner; that it was put over the side of the ship by the stevedore; that it was properly fastened to the deck of the vessel Horda and was in good condition."

Further on in the opinion, after several pages of discussion of the testimony, the trial Judge wrote as follows with respect to that issue (App. App. 8):

> "The testimony of the libelant's witnesses is in direct conflict with the evidence of the witnesses of the respondent as to whether there was a slack in the ladder."

And later in the opinion the trial Judge followed this up by stating (App. App. 10):

> "The testimony of the stevedore [Commercial] is more believable. * * * Other tests of the libelant's case disclose its weakness."

Furthermore, in his findings of fact the trial Judge specifically found that no slack had been put in the ladder by the employees of respondent Commercial (Findings of Fact 10 and 16; App. App. 16, 17).

Following that dismissal the Court of Appeals reviewed the record in the District Court and affirmed the judgment below. The scope of the review by the Court of Appeals was governed by Rule 52(a) of the Federal Rules of Civil Procedure, reading, in part, as follows:

> "* * * Findings of fact will not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

With this criterion in mind, the Court of Appeals commented that the crucial finding of the trial Judge as to the absence of slack in the ladder was "far from 'clearly erroneous'" (Petition 37).

The Court of Appeals, having so found, had little alternative but to affirm the judgment below, since the language of Rule 52(a) is mandatory and not permissive.

The scope and limitation of a review by a Court of Appeals in such a situation was definitively set forth by this Court in *McAllister* v. *United States*, 348 U. S. 19, 20 (1954), when Mr. Justice Minton wrote as follows:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals *may not* set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure." (Emphasis supplied.)

To the same effect is the language in *Petterson* v. *Alaska Steamship Co.*, 205 F. (2d) 478, 479 (9 C. A.), affirmed 347 U. S. 396, without opinion:

> "In admiralty appeals *findings of fact based upon credibility of witnesses who testify in open court will not be set aside.* But an admiralty appeal is a trial *de novo, Olsen* v. *Alaska Packers*, 9 Cir., 114 F. 2d 364, and this court may make its own inferences from the facts as found *where it does not upset the findings based on the credibility of witnesses.*" (Emphasis supplied.)

The Court of Appeals was, of course, well aware from the findings of the trial Judge and from the wording o his opinion that his decision was in part based upon hi appraisal of the credibility of the various fact witnesse who testified personally before him.

Even if we were to assume that the trial record per mitted of two views of the weight of the evidence, on favorable to the petitioner and the other unfavorable, th limitations of a review under Rule 52(a) are clearly se forth by the decision of this Court in *United States* v. *Yel low Cab Co.*, 338 U. S. 338 (1949). This was a suit i equity, under Sections 1 and 2 of the Sherman Anti-Trus Act, where the District Court found that the governmen had failed to prove its case. The cause came before thi Court by direct appeal under the Expediting Act, 15 U. S Code, Section 29. Mr. Justice Jackson commented on pag 340 that:

> "What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own."

Later, at page 342, Mr. Justice Jackson commented upon the scope of the review by this Court under Rule 52(a):

> "While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

There is nothing that would indicate that the conduct of the trial and appeal of this action was any different from the myriad of similar cases where an attempt is made on appeal to have the Court of Appeals retry a non-jury case on all evidence. The Court of Appeals in this instance

reviewed the District Court judgment within the permissible limits of Rule 52(a) of the Federal Rules of Civil Procedure with an eye to the latest pronouncement of this Court with respect to that rule as contained in *McAllister* v. *United States, supra.*

There is No Conflict of Decisions

Petitioner suggests on pages 28 through 30 of his Petition, that the decision of the Court of Appeals is inconsistent with the decisions of this Court in *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 394, and *McAllister* v. *United States, supra,* and inconsistent with the decision of the United States Court of Appeals for the Eighth Circuit in *State Farm Mutual Auto Insurance Co.* v. *Bonacci,* 111 F. (2d) 412 (1940).

On page 29 of the Petition there is quoted the following portion of the opinion in *United States* v. *United States Gypsum, supra,* as found at 333 U. S. 395:

> "The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This, of course, is the very same language which was quoted by this Court in *McAllister* v. *United States, supra,* and is to be found on the very page referred to by Chief Judge Clark after he had held that the crucial finding of the trial Court was "far from 'clearly erroneous'" (Petition 37). In the light of this specific reference by Chief Judge Clark to the language of this Court, can we assume that he did not apply the approved criterion? Is it not implicit in the opinion of the Court of Appeals that the Court was *not* "left with the definite and firm conviction that a mistake has been committed"?

Nor is there anything in the decision of the Eighth Circuit in *State Farm Mutual Auto Insurance Co.* v. *Bonacci supra,* which varies or differs from the application of Rule 52(a) either by this Court or by the United States Court of Appeals for the Second Circuit in the instant matter. As a matter of fact, a comparison between that Eighth Circuit decision and the instant matter is hardly in point since the *Ludvigsen* witnesses all testified in person before the trial Judge and he was personally able to assess their credibility. On the other hand, in the *Bonacci* case the situation was different:

> "The facts largely relied upon in this case consist of testimony and written statements given or made by the defendants not in the presence of the lower court but in the course of trial of the damage actions in the state court. The lower court, as to such evidence, had no better opportunity of judging the credibility of the witnesses than does the appellate court" (111 F. 2d 415).

In other respects the *Bonacci* decision conforms to the rules governing the application of Rule 52(a) as set forth by this Court and as put into practice by the United States Court of Appeals for the Second Circuit. The italicized portions of the *Bonacci* decision quoted on pages 29 and 30 of the Petition could as well have been included in the Court of Appeals opinion in this *Ludvigsen* matter. Obviously, "If the findings are clearly erroneous, the appellate court should set them aside" (111 F. 2d 415). No one questions that fact and no one is contending that findings of fact are conclusive (333 U. S. 395; Petition 29). Chief Judge Clark did not say the findings of fact were conclusive.

The Eighth Circuit, in the *Bonacci* case, said that Rule 52(a) "plainly contemplates a review by the appellate court of the sufficiency of the evidence to sustain the findings" (111 F. 2d 415). Applying that standard to the instant matter, it will be noted that Chief Judge Clark held that the "crucial finding of the Trial Court was carefully accom-

modated to the testimony as presented" (Petition 37). In other words, Chief Judge Clark, with whom the balance of the Bench agreed, was convinced "of the sufficiency of the evidence to sustain the findings".

There is no important question of Federal law presented, and the issue of fact does not warrant review by this Court.

As the Petition so clearly shows, petitioner seeks a factual review. He disagrees with the trial Judge's evaluation of the testimony and, of course, disagrees as well with the results of the review by the Court of Appeals.

The District Court Judge and three Judges of the Court of Appeals all concurred as to the facts.

In a long series of cases, this Court has subscribed to the "two-court rule" holding that the Supreme Court of the United States, being a Court of law rather than a Court for the correction of errors in fact-finding, cannot undertake to review concurrent findings of fact by two Courts below in the absence of a very obvious and exceptional showing of error. Such is the language of Mr. Justice Jackson in discussing the scope of Rule 52(a) of the Federal Rules of Civil Procedure in *Graver Manufacturing Co.* v. *Linde Co.*, 336 U. S. 271, 275 (1949). That action was subsequently reheard on other issues (337 U. S. 910 and 339 U. S. 605), but the "two-court rule" was not changed.

In *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211 (1948), rehearing denied 335 U. S. 837, the issue involved was objections made to the allowances of a claim of approximately $10,000,000 by the Missouri Pacific, one debtor corporation, against another, the New Orleans. After a full hearing, the District Court made findings and wrote an opinion overruling the objections. The Court of Appeals for the Eighth Circuit affirmed. This Court

affirmed in an opinion by Mr. Justice Jackson, and on the question of review of the issues of fact, Mr. Justice Jackson wrote (at p. 213 of 335 U. S.):

> "The issues of fact, contested in a long hearing, are not before us for review. Petitioner assured us, in support of the petition for certiorari here, that 'there is no factual controversy before this Court' and 'we assume the findings of the District Court. Our challenge is directed only to the legal import of these unchallenged facts.'
>
> Much of petitioner's argument seems to depart from these assumptions and to invite us to reach conclusions from the voluminous record in the case, contrary to those reached by the two courts below. This we cannot do. A seasoned and wise rule of this court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error" (citations).

To the same effect are the earlier rulings of this Court in *Allen, Collector of Internal Revenue* v. *Trust Company of Georgia,* 326 U. S. 630, 636 (1946), and *United States* v. *O'Donnell,* 303 U. S. 501, 508 (1938). In both these suits this Court held that since both courts below had resolved the issues of fact in favor of the same party, this Court would not re-examine the evidence, but would accept the findings of the two lower courts as establishing the facts in issue.

The "two-court rule" (so referred to in *A. & P. Tea Company* v. *Super Market Corp.,* 340 U. S. 147, 153 (1950)) establishes that there is nothing in the Petition warranting a review by this Court, since the petitioner is presenting nothing more than a factual issue upon which both lower courts were in full agreement.

CONCLUSION

For the foregoing reasons, it is respectfully submitted hat the petition for a writ of certiorari should be denied.

Respectfully submitted,

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A/S J. Ludwig Mowinckels Rederi.

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